Newspaper and Periodical Drivers Local 921, International Brotherhood of Teamsters, AFL–CIO *and* San Francisco Printing Company d/b/a San Francisco Newspaper Agency. Case 20–CB–8780

December 16, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On August 12, 1992, Administrative Law Judge Jay R. Pollack issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed cross-exceptions, a supporting brief, and an answer to the General Counsel's exceptions, and the General Counsel filed an answering brief to the Respondent's cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The complaint alleged that the Respondent violated Section 8(b)(3) of the Act by refusing to furnish the Employer with certain requested information in a timely manner. The Employer requested this information from the Respondent in order to comply with an arbitrator's award of backpay to employee Anthony Micheletti. The judge, however, dismissed the complaint as moot, relying on *Sinclair Refining Co*., 145 NLRB 732 (1963).[1] He reasoned that the arbitrator retained jurisdiction over compliance with his decision in favor of Micheletti, and that the information had been supplied to the Employer prior to the unfair labor practice hearing, in compliance with the arbitrator's rulings.

The General Counsel excepted to the judge's dismissal, arguing, inter alia, that *Sinclair* is distinguishable because in that case the complaint alleged a refusal to furnish information as the violation of the Act, but here, the alleged violation is the delay in furnishing the information. We find merit in these exceptions.

The facts are not in dispute. In an arbitration proceeding between the Respondent and the Employer over the suspension and discharge of Micheletti, the arbitrator ruled in favor of Micheletti and awarded him reinstatement and backpay. In an attempt to comply with the backpay portion of the arbitrator's award, in February 1991, the Employer requested information from the Respondent regarding Micheletti's earnings during the backpay period (a period from sometime in 1990 through March 1991). On March 8, 1991, the Respondent furnished the Employer with records of Micheletti's earnings and expenses in 1990. On April 26, 1991, the Employer requested a statement of Micheletti's earnings between January and March 1991. The Respondent furnished this information on April 30, 1991; this statement, however, did not include earnings from Micheletti's work as an independent contractor (i.e., chauffeur). On May 15, 1991, the Employer requested information regarding Micheletti's earnings as an independent contractor.[2]

At this point, a dispute arose between the parties over whether Micheletti's earnings as an independent contractor should be used to reduce the Employer's backpay calculation. The Respondent argued that because Micheletti worked as an independent contractor before his discharge, such earnings should not mitigate the backpay amount. The Employer contended that it required a statement of Micheletti's earnings as an independent contractor in order to determine whether such earnings increased as a result of time freed for independent contractor work caused by the discharge, and thus whether such earnings should be deducted from the backpay award.

Between June 6 and September 23, 1991, the parties communicated back and forth over this issue. During this time, the Respondent supplied, in pieces, some of the requested information. The parties also agreed to bring the dispute back to the arbitrator for resolution. Subsequently, the arbitration was scheduled but later indefinitely postponed by the arbitrator. The Respondent ultimately supplied all the requested information on September 23, 1991.

At the outset, we note, as did the judge, that the existence of an arbitration proceeding does not relieve a party from its duty to furnish relevant information requested by the other party.[3] Rather, when a request for relevant information is made, the nonrequesting party must either supply the information or adequately explain why it is unable to comply.[4] In addition, the Board finds that an unreasonable delay in furnishing requested information is as much a violation of the Act

[1] In that case, the Board dismissed the case as moot after the refusal to furnish information was resolved by the arbitrator. There, the parties had agreed to arbitrate the grievance; they selected an arbitrator; the respondent agreed to comply with the arbitrator's ruling; and, the respondent furnished the information in compliance with the arbitrator's ruling prior to the hearing before the trial examiner. Accordingly, the Board found that under those circumstances, a remedial order was not necessary, but did not pass on the trial examiner's finding that there had not been a violation of Sec. 8(a)(5) and (1).

[2] The Employer sought records of Micheletti's earnings as an independent contractor during the backpay period and in the years preceding his discharge (1988–1990).

[3] *Jewish Federation Council*, 306 NLRB 507 (1992).

[4] *Interstate Food Processing Corp*., 283 NLRB 303, 306 (1987).

as an out-and-out refusal to supply such information.[5] Thus, subsequent compliance with a request for information does not cure the unlawful refusal to supply the information in a timely manner and belated compliance with a request for such information does not render moot a complaint of an unlawful refusal timely to supply the requested information.[6]

Here, the judge expressly found that the Respondent delayed furnishing the requested information to the Employer because of the Respondent's contention at the time of the request that the information was not relevant to the issue of backpay. In addition, we note that the Respondent has proffered no adequate explanation for its failure to provide the information in a timely manner.[7] Therefore, by delaying the furnishing of the requested information for more than 4 months, and in the absence of any explanation for its failure to comply with the request, we find that the Respondent violated Section 8(b)(3) of the Act.

We further find, unlike the judge, that the complaint has not been rendered moot. The Respondent's belated compliance with the Employer's information request did not cure its unlawful delay and a cease-and-desist remedy remains appropriate to vindicate the policies of the Act.[8] Accordingly, we shall issue the following amended conclusions of law, remedy, and Order.

AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge's Conclusion of Law 3.

''3. By failing and refusing to furnish the Employer in a timely manner with certain requested information, the Respondent engaged in unfair labor practices within the meaning of Section 8(b)(3) of the Act.''

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist therefrom. We shall not order the Respondent to furnish the requested information because the information already has been given the Employer. Consequently, a cease-and-desist order will suffice to remedy the violation found.[9]

ORDER

The National Labor Relations Board orders that the Respondent, Newspaper and Periodical Drivers, Local 921, International Brotherhood of Teamsters, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with the Employer by failing timely to furnish it requested information relevant to its compliance with an arbitrator's award of backpay to Anthony Micheletti.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post in conspicuous places, in the Newspaper and Periodical Drivers, Local 921, International Brotherhood of Teamsters, AFL–CIO business office, meeting halls, and places where notices to its members are customarily posted, copies of the attached notice marked ''Appendix.''[10] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted immediately upon receipt and maintained for 60 consecutive days thereafter. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 20 in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[5] *Bundy Corp.*, 292 NLRB 671 (1989); *Operating Engineers Local 12*, 237 NLRB 1556, 1558–1559 (1978).

[6] *Jewish Federation Council*, supra; *D. J. Electrical Contracting*, 303 NLRB 820 (1991).

[7] The Respondent, although admitting at the hearing that the information requested was relevant to determine the amount of backpay due to Micheletti, argued that the information was in the hands of a third party and therefore equally accessible to the Employer. The judge, however, expressly rejected this argument. He found that in the absence of any evidence that the Respondent had difficulty obtaining the information, it had an affirmative obligation, as the exclusive collective-bargaining representative of the bargaining unit employees and as Micheletti's representative at the arbitration, to obtain and furnish the information to the Employer. We agree.

[8] We find *Sinclair*, supra, distinguishable. As we stated previously, in that case the complaint alleged the refusal to furnish the information as the violation of the Act. Because the information had been already furnished at the time of the hearing in that matter, the Board found that a remedial order would not effectuate the policies of the Act under those circumstances. Here, the violation alleged and found is the *delay* in providing the information.

[9] *Interstate Food Processing*, supra, 283 NLRB at 306.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to bargain in good faith with San Francisco Printing Company d/b/a San

Francisco Newspaper Agency by failing timely to furnish it with requested information relevant to its compliance with the arbitrator's award of backpay to Anthony Micheletti.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

NEWSPAPER AND PERIODICAL DRIVERS, LOCAL 921, INTERNATIONAL BROTHERHOOOD OF TEAMSTERS, AFL–CIO

Mary Vail Esq., for the General Counsel.
Andrew H. Baker, Esq. (Beeson, Tayer, & Bodine), of San Francisco, California, for the Respondent.
Nick C. Geannacopulos, Esq. (Seyfarth, Shaw, Fairweather & Geraldson), of San Francisco, California, for the Employer.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at San Francisco, California, on May 19, 1992. On September 10, 1991, San Francisco Printing Co. d/b/a San Francisco Newspaper Agency (the Employer) filed the charge alleging that Teamsters Union Local 921 (Respondent or the Union) committed certain violations of Section 8(b)(3) of the National Labor Relations Act (the Act). On October 31, 1991, the Regional Director for Region 20 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent, alleging that the Union violated Section 8(b)(3) of the Act by refusing to furnish, in a timely manner, certain requested information to the Employer. Respondent filed timely answers to the complaint, denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs.

Upon the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Employer is a Nevada corporation, with an office and place of business in San Francisco, California, where it has been engaged in the publication, circulation and distribution of daily newspapers. During calendar year 1990, the Employer derived revenues in excess of $200,000. Further, the Employer held membership in and/or subscribed to various interstate news services, published nationally syndicated features and advertised nationally sold products. Accordingly, Respondent admits and I find that the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits and I find that at all times material, Respondent has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Facts

Respondent represents a bargaining unit of drivers employed by the Employer. In 1990, employee Anthony Micheletti, a driver represented by the Respondent was suspended and discharged. A grievance was filed under the collective-bargaining agreement. Respondent processed the grievance to arbitration. In February 1991, the arbitrator found in favor of Micheletti and ordered reinstatement and backpay. The arbitrator retained jurisdiction over compliance with his decision.

Upon receipt of the arbitrator's award the Employer offered reinstatement to Micheletti. Micheletti returned to work on March 11, 1991. Maryann Kelly, labor relations manager for the Employer, sought information from the Union concerning Micheletti's earnings during the backpay period. In February, Kelly spoke with Ben Papapietro, Respondent's secretary-treasurer and asked for the records of Micheletti's earnings during the backpay period. On March 8, Kelly received records from the Union, showing Micheletti's earnings and expenses for 1990. On April 26, 1991, Kelly requested a statement of earnings of Micheletti for the period January 1991 through March 1991. On April 30, Kelly received a letter from the Union's attorney forwarding information from Micheletti's accountant showing Micheletti's earnings and expenses during the backpay period. The accountant's letter only showed earnings as an employee and did not include earnings as an independent contractor.

On May 15, Kelly sought information concerning Micheletti's earnings for work performed as an independent contractor—chauffeur. Micheletti had worked as a chauffeur before his discharge. The Union contended that since Micheletti had previously worked as chauffeur those earnings should not mitigate damages. Kelly desired the information to ascertain whether Micheletti's earnings increased during the backpay period. Kelly took the position that an increase in Micheletti's earnings would be as a result of the time freed for such work by the discharge and, therefore, that such interim earnings should be deducted from gross backpay. On June 6, the Union's attorney provided a copy of Micheletti's IRS form 1099 for the year 1989. The Union maintained that Micheletti worked as a chauffeur prior to his discharge and, therefore, his earnings as a chauffeur could not be used as interim earnings. The letter also stated that if backpay could not be resolved, the Union would request that the arbitrator schedule a backpay hearing.

Approximately 2 weeks later, Jack Ford, union business agent, called Kelly. Kelly told Ford that she had not yet received the information concerning Micheletti's earnings as an independent contractor for 1991. Further she indicated that she wanted to establish an average of Micheletti's earnings as an independent contractor for the years preceding his discharge. Ford said the information was irrelevant and that he would not give the information. Ford suggested that the parties bring the dispute to the arbitrator.

By letter dated June 21, the arbitrator scheduled a hearing for September 10. On August 2, the arbitrator, at the request of the Employer, issued a subpoena to Micheletti for the requested information. On August 15, the Union's attorney filed a motion to quash the subpoena. In a conference call, the arbitrator changed the return date for the subpoena from

August 16 to September 10. On September 6, the Employer received some of the requested information concerning Micheletti's earnings for 1988–1990. On September 9, the arbitrator granted the Employer's request for a continuance to review the supoenaed documents. The arbitration has been postponed indefinitely. On September 23, the Union supplied the Employer with the remainder of the requested information. The General Counsel's complaint alleges no violation after September 1991.

Analysis and Conclusions

It is well settled that a union's duty to bargain in good faith by furnishing requested information to an employer for the purpose of collective bargaining is commensurate with the similar duty imposed by the Act upon employers. *Teamsters Local 959 (Frontier Transportation Co.)*, 244 NLRB 19 (1979); *Machinists Local 78 (Square D Co.)*, 224 NLRB 111 (1976); *Graphic Communications Local 13 (Oakland Press Co.)*, 223 NLRB 994 (1977), enfd. 598 F.2d 267 (D.C. Cir. 1979).

It is well settled that an employer has a statutory duty to provide a union, upon request, with relevant information the union needs for the proper performance of its duties as a collective-bargaining representative. *NLRB v. Acme Industrial Co*., 385 U.S. 432, 435–436 (1967); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). In determining whether an employer is obligated to supply particular information, the question is only whether there is a ''probability that the desired information [is] relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.'' *NLRB v. Acme Industrial Co*., supra at 437. As the Supreme Court has stated, the disclosure obligation is measured by a liberal ''discovery-type standard,'' not a trial-type standard, of relevance. Id. Respondent admits that the information requested was relevant to determine the amount of backpay due Micheletti under the arbitrator's award.

Respondent argues that the information was in the hands of a third party and therefore, equally accessible to the Employer. Respondent contends that it requested the information from Micheletti and furnished the information in due course. See *Food & Commercial Workers Local 1439 (Layman's Market)*, 268 NLRB 780 (1984). See *American Commercial Lines*, 291 NLRB 1066, 1085 (1988). I do not find that argument persuasive. The Union is the exclusive representative of the employees in the bargaining unit and under Section 8(a)(5) the Employer cannot bargain directly with an employee. *General Electric Co*., 150 NLRB 192 (1964), enfd. 418 F.2d 736 (2d Cir. 1969), cert. denied 397 U.S. 965 (1970).

The Union represented Micheletti in the arbitration and the postarbitration dispute concerning backpay. I find that the Employer acted properly in requesting the information from the Union rather than from Micheletti, the grievant, or the interim employer, a disinterested third party. Under the circumstances, the Union had an affirmative obligation to obtain the information and furnish the information to the Employer. There was no evidence that Respondent had difficulty obtaining the information from Micheletti. Rather it appears the delay was caused by the Union's position that the information was not relevant to the issue of backpay.

The Union contends that the Employer should have subpoenaed the material from Micheletti since the arbitrator had retained jurisdiction for backpay purposes. In *Acme*, supra, the Supreme Court held that an employer was obligated to comply with a request for information to determine whether to pursue a grievance.

The existence of an arbitration procedure does not relieve an employer or union from its duty to furnish the other party with information necessary to determine whether to process a grievance to arbitration. *Jewish Federation Council*, 306 NLRB 507 (1992). The duty to supply the requested information does not terminate when the grievance is taken to arbitration. Id. In *International Harvester Co*., 241 NLRB 600 (1979), the Board held that a bargaining agreement which vested an arbitrator of a grievance with authority to order disclosure of information did not require deferral of the unfair labor practice charges.

However, in *Sinclair Refining Co*., 145 NLRB 732 (1963), the Board dismissed the case as moot after the refusal to furnish information was resolved by an arbitrator. In that case the circumstances were that the parties had agreed to arbitrate the grievances; the parties had selected the arbitrator; the Respondent had expressed its willingness to supply any data the arbitrator ruled was necessary; the Respondent did furnish data in accord with the rulings of the arbitrator; and the arbitration hearings were completed before the case was heard by the trial examiner. Thus, the Board found that no remedial order was necessary under the circumstances.

In the instant case the discharge of Micheletti was before an agreed-upon arbitrator. The arbitrator retained jurisdiction over compliance with the decision. The dispute over backpay and the request for information occurred while the arbitrator had jurisdiction. The Respondent complied with the rulings of the arbitrator. The information was supplied prior to the hearing before me. While the arbitration has not yet been completed, the delay is not due to the information request at issue here. Thus, I find *Sinclair Refining* to be controlling precedent and would dismiss the complaint as moot. The *International Harvester* case is distinguishable because in that case neither the dispute nor the refusal to furnish information had gone to an arbitrator. Here we are dealing with an issue that has been resolved by arbitration rather than a question of prearbitration deferral.

Conclusions of Law

1. San Francisco Newspaper Agency is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent, Local 921, International Brotherhood of Teamsters Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not violate Section 8(b)(3) of the Act as alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]